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No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, et al.,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CORNELL UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONERS

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25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Disparate Treatment And Disparate Impact Are Not Separate Forms Of Discrimination 3

A. The Prima Facie Case Of Disparate Treatment And The Defense 4

1. The Term "Prima Facie Case" Has Two Meanings: The Elements Of A Claim And The Evidence That Proves The Elements Of A Claim 4

2. *McDonnell Douglas v. Green* Identifies A Prima Facie Case In The Second Sense 5

3. Disparate Treatment Has Six Elements, One Of Which Is Intent 6

4. The Bona Fide Occupational Qualification Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks The Prima Facie Case Of Disparate Treatment 10

B. The Prima Facie Case Of Disparate Impact And The Defense ..... .11

1. The Elements Of Disparate Impact Are Identical To The Elements of Disparate Treatment Except For Intent 12

2. The Business Necessity Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks The Prima Facie Case Of Disparate Impact 16

C. The Behaviors That Constitute Disparate Impact And Disparate Treatment Are The Same 17

II. Section 4(f)(1) Of The Age Act, Which Protects Use Of "Reasonable Factors Other Than Age," Does Not Authorize Employers To Use Employment Practices That Are Not Job Related And Have An Adverse Effect On Older Workers 21

A. The RFOTA Clause Does Not Protect Employment Practices With A Disparate Impact Because Such Practices Are Arbitrary, Not Reasonable. 21

B. Congress Did Not Intend The RFOTA Clause To Protect Employment Practices With A Disparate Impact Because Congress Was Not Aware Of Disparate Impact When The Age Act Was Passed. 22

C. The Legislative History Of The RFOTA Clause Reveals That It Was Not Intended To Bar Disparate Impact, But Instead Was Meant To Protect Employment Practices That Are Fair And Reasonable. 24

III. Employment Practices That Have A Disparate Impact Fall Squarely Within the Purposes Of The Age Act Because They Are The Sort Of Evil That Congress Meant To Eradicate. 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Connecticut v. Teal,
457 U.S. 440 (1982) 13

Dothard v. Rawlinson, 433 U.S. 321 (1977)
re. BFOQ 10-11
re. disparate impact 12-16

Gregory v. Litton Sys., Inc., 316 F.Supp. 401
(C.D. Cal. 1970), *aff'd as modified*,
472 F.2d 631 (9th Cir. 1972) 24

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 2, 24

Hicks v. Crown Zellerbach Corp., 319 F.Supp.
314 (E.D. La. 1970) 24

International Union, United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991) 11

Johnson v. Transportation Agency,
480 U.S. 616 (1987) 6

McDonnell Douglas v. Green,
411 U.S. 792 (1973) 5-6

Meith v. Dothard,
418 F.Supp. 1169 (M.D. Ala. 1976) 13

Trans World Airlines v. Thurston,
469 U.S. 111 (1985) 7-9

Statutes

Age Discrimination in Employment Act
29 U.S.C. §§621 et seq.
§2(b), 29 U.S.C. §621(b) 2-3, 27
(purposes)
§4(f)(1), 29 U.S.C. §623(f)(1) 10-11
(BFOQ clause)
§4(f)(1), 29 U.S.C. §632(f)(1) 2, 21-22, 24-26
(RFOTA clause)

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e et seq.
§703(e), 42 U.S.C. §2000e-2(e) 10-11
(BFOQ clause)
§703(k)(1)(A), 42 U.S.C. §2000e-2(k)(1)(A) . 16-17
(burden of proof in disparate impact)

Congressional Materials

113 CONGRESSIONAL RECORD 31,252 (1967) 24

113 CONGRESSIONAL RECORD 31,253 (1967) 25

H. Rep. 805, 90th Cong., 1st Sess. (1967) 23

S. Rep. 707, 90th Cong., 1st Sess. (1967) 23

Miscellaneous

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Gold, Michael Evan, *Griggs' Folly...*, 7 INDUSTRIAL RELATIONS LAW JOURNAL 429 (1985) 22

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Prosser, William L., HANDBOOK OF THE LAW OF TORTS (3d ed. 1964) 5

INTEREST OF THE AMICI CURIAE[1]

The Cornell University chapter of the American Association of University Professors seeks to advance academic freedom, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. Membership is open to all faculty, librarians, and academic professionals employed by Cornell University. The chapter is particularly concerned with issues of age discrimination. Most members of the chapter are over the age of forty. Librarians and academic professionals do not enjoy tenure, and increasing numbers of teaching and research positions are being taken off the tenure track. All persons in these positions can be discharged at will and are subject to the discriminatory effects of non-job-related criteria. Even tenured professors are not fully protected from disparate impact discrimination.

The National Lawyers Guild was founded in 1937 as the first integrated national organization of lawyers in the United States. Based on the premise that the law should be used for social amelioration, the Guild currently consists of approximately 6,000 lawyers, legal workers and law students. Individually and on specific shared projects, members work nationally on a wide range of legal concerns. Labor and employment issues have been a central focus of the Guild's mission during its nearly seventy-year history, and its Labor and Employment Committee monitors working conditions in this country and internationally.

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[1]The parties' written consent to the filing of briefs amicus curiae has been filed with the Clerk of this Court. Amici state that this brief was not authored in whole or in part by counsel for any party and that no party or entity, other than Amici and their counsel, has made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Contrary to widespread belief, disparate treatment and disparate impact are not separate forms of discrimination. Except for the element of intent, the prima facie case of disparate treatment cannot be distinguished from the prima facie case of disparate impact. In both, the defendant arbitrarily affords a lesser chance to the plaintiff than to the plaintiff's comparator to benefit from an employment opportunity. The defenses to disparate treatment and disparate impact are also indistinguishable. Both when age or sex is a bona fide occupational qualification, and when an employment practice is a business necessity, the plaintiff is not qualified for the opportunity.

Congress was not aware of disparate impact when the civil rights laws of the 1960s were enacted. The realization that employment practices could be "fair in form, but discriminatory in operation"[2] did not enter the public consciousness until this Court's decision in *Griggs v. Duke Power Co.*

Section 4(f)(1) of the Age Discrimination in Employment Act authorizes practices based on "reasonable factors other than age."[3] Contrary to advocates' contentions, this section does not prove that Congress intended to protect employment practices that serve no legitimate goal of the business and disadvantage older workers. Rather, this section reveals that Congress intended to protect practices that are reasonable and fair.

The purposes of the Age Act should be used to determine how to interpret the act. Those purposes are to prohibit "arbitrary age discrimination in employment" and "to promote

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[2] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[3] 29 U.S.C. §632(f)(1).

employment of older persons based on their ability rather than age."[4] A practice that is not job related serves no legitimate goal of the business. If, in addition, the practice disadvantages older workers, it does only one thing: it arbitrarily selects on the basis of age, not ability. For these reasons, eliminating practices with a disparate impact on older workers falls within the purposes of the Age Act.

ARGUMENT

I
Disparate Impact And Disparate Treatment Are Not Separate Forms Of Discrimination.

Although it is widely believed that disparate treatment and disparate impact are separate forms of discrimination, in truth they are not.[5] Properly understood, disparate treatment and disparate impact comprise identical behaviors, with the exception of scienter. A defendant's act of disparate treatment is the same as a defendant's act of disparate impact; the only difference between them is that the defendant intends to commit disparate treatment, but does not intend to commit disparate impact.

The legal vocabulary would be clarified if we referred, not to disparate treatment and disparate impact, but to intentional and

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[4] 29 U.S.C. §621(b).

[5] For a full discussion of the almost total overlap of disparate treatment and disparate impact, *see* Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 175 (2001).

unintentional discrimination. This change would make clear that *there is only one kind of discrimination*; sometimes it is intentional, and sometimes it is not. In deference to prevailing usage, however, we will use the conventional terms in this brief.

A
The Prima Facie Case Of Disparate Treatment And The Defense

Except for the base (age, race, sex, etc.), disparate treatment under the Age Discrimination in Employment Act[6] is the same as disparate treatment under Title VII of the Civil Rights Act of 1964.[7] Accordingly, we may study either statute to learn about the nature of disparate treatment.[8] But first a few words about procedure are necessary.

1
The Term "Prima Facie Case" Has Two Meanings: The Elements Of A Claim And The Evidence That Proves The Elements Of A Claim.

The term "prima facie case" is used in two senses. It can mean the *elements* or the *material facts* of a claim; for example, the elements of battery are a harmful or offensive physical

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[6]Pub. L. 90-202, 81 Stat. 602, 29 U.S.C. §§621 et seq.

[7]Pub. L. 88-352, 78 Stat. 241, 253, 42 U.S.C. §§2000e et seq.

[8]*See* Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 586 (3d ed. 1996).

contact that is intentional.[9] This may be called the prima facie case in the first sense. "Prima facie case" can also mean the *evidentiary facts that prove* the elements of a claim; for example, a prima facie battery may be proved by the plaintiff's testimony that he was punched in the nose by the defendant, who had just said, "I hate you." This may be called the prima facie case in the second sense. Only one prima facie case in the first sense exists for each claim; in contrast, as many prima facie cases in the second sense exist as cases that come to court.

2
McDonnell Douglas v. Green Identifies A Prima Facie Case In The Second Sense.

This Court has never specified the elements of the claim of disparate treatment (the prima facie case in the first sense), but has provided in *McDonnell Douglas v. Green*[10] a convenient and widely applicable "formula" for proving disparate treatment.[11] It has always been clear that the *McDonnell*

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[9]*See* William L. Prosser, HANDBOOK OF THE LAW OF TORTS §9 (3d ed. 1964).

[10]411 U.S. 792 (1973).

[11]A complainant must

> "show[] (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of

(continued...)

Douglas formula does not state the material facts of the claim itself. For example, the formula requires the plaintiff to prove that *he* belongs to a *racial minority*, yet Title VII protects women as well as men, and prohibits sex as well as race discrimination.[12] Thus, the *McDonnell Douglas* formula is a prima facie case in the second sense.

3
Disparate Treatment Has Six Elements, One Of Which Is Intent.

Although this Court has not specified the elements of disparate treatment, they can be inferred from a study of cases in this Court. When the defendant is an employer, the elements of disparate treatment are

1. The employer is covered by the act.
2. The employer offered an employment opportunity.
3. The plaintiff is protected by the act, i.e.,
   a. the plaintiff belongs to a group that is protected by the act;
   b. the plaintiff was qualified for the opportunity;

[11](...continued)
complainant's qualifications.[13]

"[13] The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."

411 U.S. at 802.

[12] *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

   c. the plaintiff was willing to accept the opportunity.
4. The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the opportunity.
5. The cause of the plaintiff's lesser chance was membership in the protected group.
6. The employer intended to give individuals of the plaintiff's group a lesser chance to benefit from the opportunity.

Trans World Airlines v. Thurston[13] provides a good example of disparate treatment. A federal regulation prohibited persons aged sixty and older from serving as captain or co-captain on commercial flights; no similar regulation applied to flight engineers. TWA allowed captains and co-captains under sixty to bid for transfer to the job of flight engineer, but did not allow captains and co-captains over sixty to bid for transfer. This Court affirmed a judgment that TWA had committed disparate treatment.

[13] 469 U.S. 111 (1985).

ELEMENTS (MATERIAL FACTS) OF DISPARATE TREATMENT (PRIMA FACIE CASE IN THE FIRST SENSE)		PROOF (EVIDENTIARY FACTS) IN *TWA v. THURSTON* (PRIMA FACIE CASE IN THE SECOND SENSE)	
1.	The employer is covered by the act.	1.	TWA conceded it was covered by the act.
2.	The employer offered an employment opportunity.	2.	TWA allowed captains and co-captains to bid for transfer to the position of flight engineer.
3.	The plaintiff is protected by the act, i.e.,	3.	
a.	the plaintiff belongs to a group that is protected by the act;	a.	The plaintiff was sixty years old;
b.	the plaintiff was qualified for the opportunity;	b.	the plaintiff had been a captain and was qualified to serve as a flight engineer;
c.	the plaintiff was willing to accept the opportunity.	c.	the plaintiff wished to serve as a flight engineer.

4.	The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the employment opportunity.	4.	TWA allowed captains and co-captains under sixty, but not over sixty, to bid for transfer to flight engineer.
5.	The cause of the plaintiff's lesser chance was membership in the protected group.	5.	If the plaintiff had been under sixty, he would have been allowed to bid for transfer.
6.	The employer intended to give individuals of the plaintiff's group a lesser chance to benefit from the opportunity.	6.	TWA intentionally used age as the basis for denying the plaintiff the opportunity to bid for the position of flight engineer.

Causation is a crucial element of a claim for disparate treatment. Age, race, sex, etc. must be the reason the plaintiff lost an employment opportunity. When all members of the plaintiff's group are treated exactly the same (for example, no captain over sixty could bid for flight engineer), causation is obvious; but sometimes it is not. For example, suppose an employer believes that most older workers are less productive than younger workers and, accordingly, holds older applicants to a stricter standard than younger applicants. The employer's

notion is that only older workers who satisfy the stricter standard are as productive as younger workers who satisfy the normal standard. The plaintiff, an older worker, meets the normal standard, but not the stricter one, and is rejected. It might seem that age is not the cause of the plaintiff's rejection; after all, some older applicants are hired. Yet the employer denies older workers the opportunity to be judged by the same standard by which younger workers are judged. Thus, the employer intentionally affords each older worker a lesser chance than younger workers to get the job, and thereby commits disparate treatment.

4
The Bona Fide Occupational Qualification Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks the Prima Facie Case Of Disparate Treatment.

The defense to disparate treatment is the bona fide occupational qualification (BFOQ). An employer may award employment opportunities on the basis of age, religion, sex, or national origin if the characteristic is "reasonably necessary to the normal operation of that particular business."[14] In application, a characteristic is a BFOQ if all or substantially all members of the excluded class are unable to perform an essential task of the job and individual testing is not feasible.[15] Thus, this Court held in *Dothard v. Rawlinson* that being male was a BFOQ for the job of guard in maximum-security prisons

[14] Age Act §4(f)(1), 29 U.S.C. §623(f)(1); Title VII §703(e), 42 U.S.C. §2000e-2(e).

[15] *See* Lindemann & Grossman, *supra* n. 8, at 395 ff.

in Alabama because of the risk that a woman would be sexually assaulted by the inmates.[16]

Procedurally, the BFOQ is a defense because the burden of persuasion rests on the defendant.[17] Substantively, however, the BFOQ destroys an element of the plaintiff's prima facie case. Being qualified for the opportunity is an element of the prima facie case. If all persons of the plaintiff's age, religion, sex, or national origin are unable to perform an essential task of the job, the plaintiff is simply not qualified for the job. No woman was qualified to be a guard in the maximum-security prisons of Alabama because every woman faced the risk of sexual assault.

B
The Prima Facie Case Of Disparate Impact And The Defense

The prima facie case of disparate impact is identical to the prima facie case of disparate treatment, minus the element of intent. Also, the defense to disparate impact (business necessity) is identical to the defense to disparate treatment (the BFOQ) because both challenge the plaintiff's qualifications for the opportunity in question.

[16] 433 U.S. 321, 332 ff. (1977).

[17] *Dothard v. Rawlinson*, 433 U.S. 321, 334 ("the District Court erred in rejecting the [defendant's] contention that Regulation 204 [excluding women from certain jobs] falls within the narrow ambit of the BFOQ exception"); *International Union, United Automobile Workers v. Johnson Controls*, 499 U.S. 187, 206 (1991) ("We have no difficulty concluding that Johnson Controls cannot establish a BFOQ").

1
The Elements Of Disparate Impact Are Identical To The Elements Of Disparate Treatment Except For Intent.

This Court has not specified the elements of disparate impact, but the elements can also be inferred from a study of cases in this Court. When the defendant is an employer, the elements of disparate impact are

1. The employer is covered by the act.
2. The employer offered an employment opportunity.
3. The plaintiff is protected by the act, i.e.,
   a. the plaintiff belongs to a group that is protected by the act;
   b. the plaintiff was qualified for the opportunity;
   c. the plaintiff was willing to accept the opportunity.
4. The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the opportunity.
5. The cause of the plaintiff's lesser chance was membership in the protected group.

These elements are identical to the elements of disparate treatment except that intent is absent.

From this point on, it will be helpful to distinguish two related terms. We will use the term "adverse effect" to refer to an employment practice that disadvantages a protected group in relation to its comparators, and the term "disparate impact" to refer to an employment practice that has an adverse effect and, in addition, is not job related.

Another aspect of *Dothard v. Rawlinson* provides a good

example of disparate impact. The Board of Corrections of the State of Alabama was hiring prison guards. The hiring process had two steps. Step one: applicants were eliminated if they did not stand a minimum of 5 feet 2 inches tall and weigh a minimum of 120 pounds.[18] Step two: applicants who met these minima were evaluated according to education and experience.[19] The minima had an adverse effect on women because 99 percent of men but only 51 percent of women were tall and heavy enough. Also, the minima were not job related because they did not distinguish between qualified and unqualified workers.

ELEMENTS (MATERIAL FACTS) OF DISPARATE IMPACT (PRIMA FACIE CASE IN THE FIRST SENSE)	PROOF (EVIDENTIARY FACTS) IN *DOTHARD v. RAWLINSON* (PRIMA FACIE CASE IN THE SECOND SENSE)
1. The employer is covered by the act.	1. The Board of Corrections conceded it was covered by the act.
2. The employer offered an employment opportunity.	2. The Board was evaluating applicants for prison guard on the basis of education and experience.

[18]Progressing through a selection process is an opportunity protected by Title VII. *Connecticut v. Teal*, 457 U.S. 440 (1982).

[19]*Meith v. Dothard*, 418 F.Supp. 1169, 1175 (M.D. Ala. 1976).

3.	The plaintiffs are protected by the act, i.e.,	3.	
a.	the plaintiffs belong to a group that is protected by the act;	a.	The plaintiffs were women;
b.	the plaintiffs were qualified for the opportunity;	b.	women were capable of being prison guards;
c.	the plaintiffs were willing to accept the opportunity.	c.	women were interested in becoming prison guards.
4.	The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the employment opportunity.	4.	The height and weight minima had an adverse effect on women because 99 percent of men but only 51 percent of women satisfied the minima.
5.	The cause of the plaintiffs' lesser chance was membership in the protected group.	5.	Because the height and weight minima were not job related, they served only to exclude women.

As in a disparate treatment case, causation is a crucial element in a disparate impact case; and yet it is not obvious how age, race, or sex, etc. is the cause of a disparate impact. After all, the majority of women met the height and weight minima, and some men did not. In what sense was Ms. Dothard's sex the *cause* of her not being allowed to progress to step two of the hiring process? The answer lies in the knowledge that the height and weight minima were not job related. There was no evidence that larger persons made better guards than smaller persons. As a result, the height and weight minima were arbitrary. They served no legitimate goal of the business; they were ineffective in selecting qualified candidates for the job. But the minima were not inert. What did they do? They did one thing and one thing only: *they distinguished men from women.* Assuming that equal numbers of men and women submitted applications, the minima ensured that approximately twice as many men would progress to step two.[20]

The effect of the minima on applicants was the same as though the employer had said, "There are many applicants for this job. I don't know which ones are qualified and which are not. I will evaluate the qualifications of 99 percent of the men but only 59 percent of the women." Thus, by using these minima as selection criteria, the employer arbitrarily gave each qualified man a 99 percent chance of progressing to step two of the hiring process, but each qualified woman only a 59 percent chance. As in a disparate treatment case, therefore, an employer in a disparate impact case affords each victim of discrimination a lesser chance to benefit from the employment opportunity.

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[20]One hundred men apply; 99 progress to step two. One hundred women apply; 59 progress to step two. Thus, (99 + 59 =) 158 persons progress to step two; (99 ÷ 158 =) .63 of them are men, and (59 ÷ 158 =) .37 are women.

2
The Business Necessity Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks The Prima Facie Case Of Disparate Impact.

Our understanding of disparate impact is reinforced by consideration of the defense of job relatedness. After the plaintiff proves that an employment practice has an adverse effect, the burden shifts to the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[21] If an employment practice is job related, it distinguishes between qualified and unqualified workers.[22] Accordingly, if the height and weight minima in *Dothard* had been job related—that is, if larger persons did in fact make better prison guards than smaller persons—the minima would have distinguished between qualified and unqualified persons. The minima would still have had an adverse effect on women, but the cause of the adverse effect would have been the genuine needs of the business, not sex. Proportionally fewer women would have progressed to step two because proportionally fewer women would have been qualified for the job.

In sum, proof that an employment practice is job related is actually proof that proportionally fewer members of the plaintiffs' group are qualified for the opportunity than are members of the comparators' group. Thus—again as in disparate treatment—job relatedness is procedurally a defense to disparate impact because the burden of proving job

[21]Title VII §703(k)(1)(A), 42 U.S.C. §2000e-2(k)(1)(A).

[22]*See* Lindemann & Grossman, *supra* n. 8, at 106 ff.

relatedness falls on the defendant;[23] but, substantively, job relatedness destroys an element of the prima facie case, namely, the plaintiffs' qualifications.

We have seen that the elements of disparate impact and disparate treatment (the prima facie cases in the first sense) are identical except for intent. Now it is evident that the defenses, which actually refute the plaintiffs' proof that they are qualified for the opportunities, are also identical.

C
The Behaviors That Constitute Disparate Impact And Disparate Treatment Are The Same.

The prima facie cases of disparate impact and disparate treatment are the same except that disparate impact omits intent. The defenses to disparate impact and disparate treatment are the same because they rebut the plaintiffs' proof of qualifications. It should follow that the behaviors that constitute disparate impact and disparate treatment are also the same, and they are.

When TWA decided that it would not employ anyone over the age of sixty for the job of flight engineer, the selection criterion was obviously age. A way to describe most (if not all) disparate treatment cases is that a protected characteristic (age, race, sex, etc.) is the selection criterion.

A protected characteristic is also the selection criterion in disparate impact cases. Suppose an airline has a rule that says no one with dentures may hold the job of flight engineer. Let us assume that the airline adopts the no-denture rule in good faith

[23]Title VII §703(k)(1)(A), 42 U.S.C. §2000e-2(k)(1)(A).

(believing, perhaps, that dentures might dislodge in high turbulence) and not as a subterfuge to exclude older workers. Let us also assume that 60 percent of persons aged sixty and above have dentures, as compared to 20 percent of younger persons. Finally, let us assume that no good evidence exists that dentures are prone to dislodge during turbulence. On these facts, the no-denture rule has an adverse effect on older workers and serves no legitimate interest of the employer. In fact, the rule *does only one thing*: it disadvantages older workers. It arbitrarily gives each of them a lesser chance to benefit from the employment opportunity. It is, in effect, exactly as though the employer had said, "Two hundred persons are qualified for the job, half under sixty and half over sixty. I will allow 80 of the younger ones and 40 of the older ones to bid for jobs as flight engineers." Thus—precisely as in disparate treatment—a protected characteristic is the selection criterion in disparate impact. In our hypothetical case, the selection criterion is age (in the form of the no-denture requirement), and it arbitrarily determines the chance each qualified person has to bid on the job of flight engineer. For no good reason, the no-denture rule gives each person under the age of sixty an 80 percent chance to bid, and each person over the age of sixty only a 40 percent chance to bid.

Three simple hypothetical cases will demonstrate the almost complete overlap of disparate impact and disparate treatment.

Case 1

1. An employer gives all applicants a written test.
2. Applicants must pass the test in order to qualify for an interview.
3. The test contains many questions about popular culture, such as music and films, of which younger persons are

more knowledgeable than older persons. In consequence, 80 percent of applicants under age forty pass the test, but only 40 percent of applicants over age forty pass.
4. The test does not predict success on the job.

Case 1 is a disparate impact case.

Case 2

1. Based on personal experience and anecdotes, an employer believes that younger workers are better suited for a job than older workers are.
2. The employer purposefully devises a written test that is unrelated to the job and favors younger workers. It is composed of questions about popular culture, such as music and films, of which younger persons are more knowledgeable than older persons.
3. Applicants must pass the test in order to qualify for an interview.
4. Eighty percent of applicants under age forty pass the test, but only 40 percent of applicants over age forty pass.

Case 2 is a disparate treatment case.

Case 3

1. An employer gives all applicants a written test.
2. Applicants must pass the test in order to qualify for an interview.
3. The test contains many questions about popular culture, such as music and films, of which younger persons are

more knowledgeable than older persons. In consequence, 80 percent of applicants under age forty pass the test, but only 40 percent of applicants over age forty pass.

4. The test does not predict success on the job.
5. At all times the employer has been aware of facts 1-4. That is, the employer knows the test has an adverse effect on older workers and is not job related.

Is Case 3 a disparate impact or a disparate treatment case? Facts 1-4 constitute a classic disparate impact case. Fact 5 establishes the employer's scienter. Does the leopard change into a lion? No. It is the same animal all along. In each hypothetical case, the employer's behavior serves no legitimate goal of the business, and arbitrarily disadvantages qualified plaintiffs relative to their comparators. The only difference among the cases is that in cases 2 and 3, the employer does it on purpose, whereas in case 1 the employer does it unintentionally.

Thus, close analysis demonstrates that the behaviors that constitute disparate impact and disparate treatment are indistinguishable. The Age Act and Title VII proscribe denying employment opportunities on the basis of age, race, sex, etc. Discrimination, whether called disparate impact (but more properly called unintentional discrimination) or disparate treatment (intentional discrimination), arbitrarily denies workers in protected classes the same opportunities that their comparators enjoy. Except for intent, there is only one kind of discrimination, and the only difference between disparate impact and disparate treatment is the defendant's state of mind.

It follows that the evil outlawed by disparate impact is substantially the same as the evil outlawed by disparate treatment.

II
Section 4(f)(1) Of The Age Act, Which Protects Use Of "Reasonable Factors Other Than Age," Does Not Authorize Employers To Use Employment Practices That Are Not Job Related And Have An Adverse Effect On Older Workers.

Section 4(f)(1) of the Age Act states that it is not unlawful for an employer

> "to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age ...."[24]

Advocates in search of arguments assert the clause "reasonable factors other than age" (RFOTA) was intended to exclude disparate impact from the Age Act, in other words, that Congress intended to allow employers to maintain practices that are not job related and have an adverse effect on older workers. This argument is falsified by the text of the RFOTA clause, the legislative history of the Age Act in general, and the specific legislative history of the RFOTA clause.

A
The RFOTA Clause Does Not Protect Employment Practices With A Disparate Impact Because Such Practices Are Arbitrary, Not Reasonable.

The RFOTA clause specifically protects employment practices "based on *reasonable* factors other than age" (emphasis added). Practices with a disparate impact, however, are far from

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[24] 29 U.S.C. §623(f)(1).

reasonable. Instead, such practices are arbitrary because they serve no legitimate goal of the business and, without good reason, deprive older workers of employment opportunities. Thus, the text of the RFOTA clause defeats the argument that the clause was intended to protect employment practices that have a disparate impact on older workers.

B
Congress Did Not Intend The RFOTA Clause To Protect Employment Practices With A Disparate Impact Because Congress Was Not Aware Of Disparate Impact When The Age Act Was Passed.

Congress did not intend the RFOTA clause to exclude disparate impact from the Age Act because, in truth, Congress formed no intent regarding disparate impact. The reason is that Congress was not aware of disparate impact at the time the bill was enacted. The realization that disparate impact is a form of employment discrimination did not enter the public mind until the 1970s. Thus, Congress never addressed the question of whether to outlaw disparate impact, and the text of the act and its legislative history should not be contorted to answer to a question that was never asked.

Although proving a negative is difficult, it is not impossible; and in this case the historical record is clear. Congress did not understand disparate impact during the debates over Title VII in 1963 and 1964[25] or during consideration of the Age Act in 1967. A reader with no ax to grind will find no discussion of disparate impact in the Secretary of Labor's report to Congress

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[25]*See* Michael Evan Gold, *Griggs Folly*, 7 INDUSTRIAL RELATIONS LAW JOURNAL 429, 489 ff. (1985) (discussing the legislative history of Title VII).

on age discrimination,[26] the committee reports in the House of Representatives and the Senate,[27] or the floor debates on the Age Act. Our legislators neither condemned disparate impact nor condoned it because they did not know about it.

Almost no one else did either. The idea of disparate impact did not begin to enter public consciousness until the end of the 1960s. The idea was born in a controversy over intelligence tests, which came under attack earlier in the decade on the ground that they were culturally biased. The idea was that disadvantaged groups in society scored lower than others on intelligence tests, not because of lack of innate ability, but because of lesser educational opportunities and cultural segregation.

Today we readily see how this idea can be applied to employment tests. They, too, may be biased against disadvantaged groups: for tests that are not job related can favor whites over people of color, or younger workers over older workers, not because of ability, but because of varying educational opportunities and cultural factors. But this entirely correct application of an important idea had not occurred, at least not in public, in 1967. Rather, the first appearance of the application to employment tests was an article published in the Harvard Law Review in 1969.[28] The article was highly influential, but it could not have influenced a statute that was enacted two years before the article was published. For

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[26]THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965).

[27]H. Rep. 805, 90th Cong., 1st Sess. (Oct. 23, 1967); S. Rep. 707, 90th Cong., 1st Sess. (Nov. 4, 1967).

[28]George Cooper and Richard Sobel, *Seniority and Testing Under Fair Employment Laws*, 82 HARVARD LAW REVIEW 1598 (1969).

practical purposes, the law-making community did not become aware of disparate impact until this Court's decision in *Griggs v. Duke Power Co.* in 1971.[29]

It follows that Congress neither accepted nor rejected disparate impact under the Age Act. Congress certainly understood arbitrary behavior, but did not realize that it included disparate impact.

C
The Legislative History Of The RFOTA Clause Reveals That It Was Not Intended To Bar Disparate Impact, But Instead Was Meant To Protect Employment Practices That Are Fair And Reasonable.

Senator Yarborough, the floor manager of the bill that became the Age Act[30] and, therefore, an authoritative source, illustrated the situation to which the RFOTA clause would apply:

> "For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply."[31]

[29] 401 U.S. 424 (1971). *Griggs* was anticipated by two cases, *Gregory v. Litton Sys., Inc.*, 316 F.Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972), and *Hicks v. Crown Zellerbach Corp.*, 319 F.Supp. 314 (E.D. La. 1970). Both were decided after the Age Act became law.

[30] 113 CONGRESSIONAL RECORD 31,252 (1967) (remarks of Sen. Yarborough).

This example is instructive, but only if it is interpreted in a balanced way.

It would be excessive to argue that the example proves that Congress intended the RFOTA clause to exclude disparate impact from the Age Act. A practice with a disparate impact is not job related. Accordingly, if Senator Yarborough had understood the RFOTA clause to protect such a practice (and thereby nullify disparate impact under the act), the practice in his example would not have been job related. But in fact the practice is job related. Indeed, the example captures the essence of the business necessity defense to disparate impact. In the example—

- An employer gives a test to a worker.
- The test is job related ("the job requires a certain speed").
- The worker fails the test ("a man cannot do certain things"; "some men slow up sooner than others").
- The employer has not violated the Age Act ("the law would not apply").

Far from demonstrating an intent to exclude disparate impact, Senator Yarborough's example seems to ratify disparate impact by providing the customary defense. But this argument is also excessive. The facts of the example do not suggest that the employer's test had an adverse effect on older workers. The man might fail the test at thirty-five or at fifty-five, and there is no suggestion that more older than younger workers fail the

[31] *Id.* at 31,253.

test.

A balanced reading of Senator Yarborough's example shows that the RFOTA clause was intended to protect employment practices that are reasonable and fair. A job requires a certain speed of production. Surely it is reasonable for an employer to test workers to determine whether they can produce at that speed. A man takes the test and fails. His failure is unfortunate, but it is fair. It is anything but arbitrary.

Senator Yarborough's example confirms what the text of the RFOTA clause and the general legislative history of the Age Act reveal. Congress was not aware of disparate impact in 1967. Congress meant the RFOTA clause to protect reasonable and fair employment practices. The clause was not intended to protect arbitrary practices.

III

Employment Practices That Have A Disparate Impact Fall Squarely Within the Purposes Of The Age Act Because They Are The Sort Of Evil That Congress Meant To Eradicate.

Liberty should not be restricted without good reason. A statute that does not prohibit certain conduct should not be interpreted to proscribe that conduct unless it clearly falls within the evil the statute was meant to eliminate. The question, therefore, is whether disparate impact falls within the evil at which the Age Act was aimed. The answer is yes.

That disparate impact and disparate treatment are indistinguishable except for intent stands as strong evidence that both address the same evil. If one serves the purposes of the Age Act, so does the other. Examination of the purposes stated in the act buttresses this conclusion.

Congress stated its purposes clearly. One of them is

> "...to prohibit arbitrary age discrimination in employment...."[32]

An employment practice that is not job related is arbitrary. Some arbitrary practices are not discriminatory, and the law may ignore them. An employer may refuse to hire anyone born under the sign of Virgo. But if an arbitrary practice is also discriminatory—if it favors younger workers over older workers, all of whom are willing and able to perform the work in question—the practice is an evil of the sort that Congress meant to eradicate.

Another purpose of the Age Act is

> "...to promote employment of older persons based on their ability rather than age...."[33]

A practice with a disparate impact on older workers selects, not on the basis of ability, but on the basis of age. This is directly contrary to the purpose of the Age Act.

Outlawing disparate impact would serve the purposes of the Age Act. It would ensure that older persons are indeed judged *on the basis of ability rather than age*.

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[32] 29 U.S.C. §621(b).

[33] *Id.*

CONCLUSION

Employment discrimination is like Janus: a creature with two faces but one body. Disparate impact and disparate treatment are similar in all ways except that the latter includes scienter. Although Congress was not aware of disparate impact in 1967, Congress clearly stated the evils it intended to eradicate. These evils include arbitrary behavior, which disparate impact incarnates. For these reasons, Amicus respectfully requests that this Court reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand the case for further proceedings.

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